United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-7443

United States Court of Appeals

For the Second Circuit

B P/S

BARBARA GIRARD,

Plaintiff-Appellant,

against

94TH STREET AND FIFTH AVENUE CORPORATION, LAWRENCE WILKINSON, JOHN H. STOOKEY and THOMAS E. MURRAY,

Defendants-Appellees.

BRIEF FOR APPELLANT

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Preliminary Statement

Barbara Gutmacher Girard appeals from an order of Judge Robert J. Ward (2A, 105A)* summarily dismissing her civil rights complaint in which she charges that the defendants, Lawrence Wilkinson, John H. Stookey and Thomas E. Murray, arbitrarily and destructively conspired to deprive her of her $300,000 cooperative apartment solely because she is a woman, in violation of sections 1 and 2 of the Civil Rights Act of 1871, 42 U.S.C. §§1983 and 1985(3) (1970). Judge Ward's opinion (89A-102A) has not yet been reported, but it has been excerpted. 44 U.S.L.W. 2025 (S.D. N.Y. June 30, 1975).

* References are to pages of the Appendix.

Constitutional and Statutory Provisions Involved

1. Fifth Amendment

* * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Fourteenth Amendment, Sections 1 and 5

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. Civil Rights Act of 1871, §1, 42 U.S.C. §1983 (1970)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

4. Civil Rights Act of 1871, §2, 42 U.S.C. §1985 (3) (1970)

> If two or more persons in any State or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws * * * if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Issue Presented for Review

Did the conspiracy of the defendants, Lawrence Wilkinson, John H. Stookey and Thomas E. Murray, to deprive Barbara Gutmacher Girard of her $300,000 cooperative apartment solely because she is a woman, violate sections 1 and 2 of the Civil Rights Act of 1871, 42 U.S.C. §§1983 and 1985 (3) (1970)?

Statement of the Case

On July 20, 1963 Barbara Gutmacher, the daughter of Rose and Martin Gutmacher, married Stephen S. Girard. One child, Nicole, was born of this union on July 25, 1966 (34A, 44A).

The Girards purchased 497 shares of the capital stock of the corporate defendant and by reason of this purchase

became the owners of the proprietary lease to the fourth floor of the building at 1125 Fifth Avenue, New York, New York. The stock was taken in the name of Stephen S. Girard (13A-33A). On January 10, 1968 the Girards moved into this cooperative apartment (62A). This became their marital home. Barbara and her daughter Nicole, now age 9, are still there. They want to stay there. That is why we are here.

In 1973 the Girards were divorced. As part of the separation agreement between them, which was incorporated in the divorce decree, Stephen S. Girard transferred to his wife Barbara, in lieu of alimony, the 497 shares of stock in the cooperative defendant and the proprietary lease to the fourth floor at 1125 Fifth Avenue (35A-36A, 53A).

However, the defendants, Lawrence Wilkinson, John H. Stookey and Thomas E. Murray, conspired to deprive the plaintiff, Barbara Gutmacher Girard, of her fourth floor $300,000 cooperative apartment. They arbitrarily refused to recognize her as the rightful owner. The complaint alleges in Paragraph 14 that "the defendants conspired with each other and formed a deliberate design in purpose to injure this plaintiff solely for the reason that she is of the female sex, and to deprive her of her civil rights by reason of her sex and of her substantial property rights in the subject premises, and, in particular, the ownership of the aforesaid shares of stock and the proprietary lease in said premises, the purpose, intent and result of which was to enable, permit and allow the said defendants to receive for their own use and benefit and not for the

benefit of plaintiff the sole and exclusive right to determine who shall own said shares of stock and the proprietary lease in the subject premises, and the said defendants did the various wrongful and unlawful acts hereinafter alleged, all in furtherance of such unlawful design and purpose." (6A).

The complaint alleges, among other things, in Paragraph 16 (b) that in furtherance of the conspiracy the defendants "specifically refused plaintiff an opportunity to appear and be present at any discussions or meetings of the officers and Board of Directors of the corporate defendant at which she could establish her proprietary interest in said shares of stock and lease, and refused to provide plaintiff with minutes of said meetings or with any statement, written or oral, which would explain the basis of the aforesaid acts." (7A).

The plaintiff, Barbara Gutmacher Girard, was never accorded any meeting with the defendants. They would not hear her. They told her nothing. Theirs was arbitrary action at its worst and ugliest.

They would not accept her money. To do that might have meant that they recognized Barbara Gutmacher Girard as the lawful possessor of the $300,000 fourth floor cooperative apartment at 1125 Fifth Avenue; and, in the eyes of the conspiring defendants, God forbid any such result. They would accept anything rather than that. The complaint alleges in Paragraph 16 (c) that the conspiring defendants in furtherance of their conspiracy:

> Failed and refused to accept any checks or other payments tendered by plaintiff or her agents in full

> payment of the maintenance required for occupancy of said demised premises, although plaintiff duly offered to pay same and has, in fact, tendered to the corporate defendant any and all payments required under the terms of the aforesaid proprietary lease, which payments were previously accepted by the corporate defendant from Stephen S. Girard and/or plaintiff. (8A).

Not only did the defendants refuse to take Barbara Gutmacher Girard's money; they also refused to accept a guarantee from her father for any monies that might be due from her. The complaint alleges in Paragraph 16 (d) that the conspiring defendants in furtherance of their conspiracy:

> Failed and refused to accept any guarantee by any persons financially able to discharge any indebtedness that may arise to the corporate defendant by reason of plaintiff's continued occupancy of the subject premises as tenant thereof. (8A).

In addition, the conspiring defendants engaged in a deliberate and malicious campaign of annoying the plaintiff, Barbara Gutmacher Girard, with harassing telephone calls at all hours of the night and day. The complaint alleges in Paragraph 16 (f) that the conspiring defendants in furtherance of their conspiracy:

> Deliberately and maliciously made telephone calls to plaintiff at unreasonable hours solely for the purpose of harassing and annoying her in order to force plaintiff to vacate said premises and to withdraw her demand to the corporate defendant to recognize her as the lawful owner of the aforesaid shares of stock and proprietary lease to said premises. (8A).

Last, but not least, the conspiring defendants sought to evict the plaintiff, Barbara Gutmacher Girard, from her fourth floor $300,000 cooperative apartment, her domicile and marital home, and to throw her and her 9-year-old daughter, Nicole, out into the street.

ARGUMENT

POINT I

The provisions of the Fourteenth Amendment, through the conspiracy provisions of the Civil Rights Act of 1871, 42 U.S.C. §1985 (3) (1970), "provide a cause of action against purely private parties." *Westberry* v. *Gilman Paper Co.*, 507 F. 2d 206, 208 (5th Cir. 1975).

Section 2 of the Civil Rights Act of 1871, 42 U.S.C. §1985 (3) (1970), provides a cause of action against "two or more persons in any state or territory" if they "conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."

The United States Supreme Court in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), settled that this language applies to purely private conspiracies. That case involved some Mississippi whites who sought to block the passage of some blacks in an automobile upon the public highways. The Court held that the blacks had a cause of action against the whites, saying through Justice Stewart:

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all. At 102.

Since then, four United States Courts of Appeals, the Third, Fifth, Sixth and Eighth Circuits, under varying circumstances, and various district courts have held that the conspiracy provisions of section 2 of the Civil Rights Act of 1871, 42 U.S.C. §1985 (3) (1970), apply to purely private conspiracies. The most closely reasoned case is *Westberry* v. *Gilman Paper Co.*, 507 F. 2d 206 (5th Cir. 1975), which involved a white environmentalist who brought suit against the defendant corporation and three individuals. The plaintiff had sought investigations of the corporate defendant for possible violation of federal pollution laws. The plaintiff alleged that the defendants conspired to take his life and his job, succeeding in the latter. The Fifth Circuit held that he had a cause of action, saying:

> This case pushes us to the frontiers of Fourteenth Amendment interpretation. We must address ourselves to a question which the Supreme Court postponed in Griffin v. Breckenridge: does the Fourteenth Amendment, through the vehicle of 42 U.S.C. §1985 (3), provide a cause of action against purely private parties?
>
> Today we hold that the amendment and the statute operate in tandem to provide such a cause of action. In so holding, we join a unanimous en banc decision by the Eighth Circuit and a decision by the Third Circuit.
>
> * * *

> Constitutional viability is not a theorem, it is a fact in our volatile jurisprudence, without which the past would stultify the present and the heavy hand of history would stunt our ethical growth and enervate our powers to meet governmental responsibilities. Here, we do not erect a new structure for a constitutional law of torts but rather enter a door which Griffin left ajar. At 207-08, 215.

The case in the Eighth Circuit, *Action* v. *Gannon*, 450 F. 2d 1227 (1971) (en banc) (unanimous decision), involved a group of blacks who were engaged in a campaign to disrupt the religious services of a predominantly white Catholic parish. The Eighth Circuit held that the whites had a cause of action. Although the blacks had a First Amendment right of freedom of speech, the whites had a First Amendment right to freedom of worship. The Eighth Circuit held that the whites "were clearly entitled to injunctive relief because the evidence established that the defendants had disrupted religious services at the Cathedral and that they would continue to do so unless enjoined." At 1238.

The Sixth Circuit in *Cameron* v. *Brock*, 473 F. 2d 608 (6th Cir. 1973), applied the conspiracy provisions of section 1985 (3) to opponents in a political campaign saying:

> We hold that §1985 (3)'s protection reaches clearly defined classes, such as supporters of a political candidate. If a plaintiff can show that he was denied the protection of the law because of the class of which he was a member, he has an actionable claim under §1985 (3). This interpretation does not transform the statute into the "general federal tort law" feared by the *Griffin* Court and gives full effect to the Congressional purpose in enacting the statute. At 610.

In the Third Circuit case, *Richardson* v. *Miller*, 446 F.2d 1247 (1971), the plaintiff alleged that the defendants, all of whom were private individuals, dismissed him from his employment because he expressed views which were critical of what he believed to be their racially discriminatory employment practices. The Third Circuit held that the complaint stated a cause of action, concluding:

> In *Griffin*, the Court concluded that Section 1985 (3) embraced private conspiracies to deprive any person of equal protection of law or equal privileges and immunities under the law where there exists a "racial, or perhaps otherwise class-based invidiously discriminatory animus" behind the conspirators' action. "The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." *Griffin, supra*, at p. 102, * * *.
>
> * * *
>
> We realize that the district court did not have the benefit of the Supreme Court's opinion in *Griffin* when it filed its March 25, 1970 Order from which this appeal was taken. However, we nonetheless conclude that the *Griffin* decision provides an adequate basis upon which to conclude that plaintiff's complaint at least states a cause of action under section 1985 (3). At 1249.

Reference may also h pfully be made to a few district court opinions. In *Pendrell* v. *Chatham College*, 386 F. Supp. 341 (W.D. Pa. 1974), a former professor at a private college alleged, among other things, that a contract of employment with the college was not renewed because she was a woman. The court held:

> The second particular question is whether §1985 can support a cause of action for sex discrimination, bearing in mind that, notwithstanding plaintiff's in-

> artful pleading, a cause of action for sex discrimination against a private employer is in essence what is sought to be maintained here. Since §1985 equally draws its validity from the Fourteenth Amendment as well as the Thirteenth Amendment, and even though the Thirteenth Amendment is applicable only to discrimination against black persons and not to discrimination against women, I will hold that it will. In this instance the Thirteenth Amendment's restrictiveness is overborne by the all-inclusive effect of the Equal Protection clause of the Fourteenth Amendment. At 348.

In another similar case, *Rackin* v. *University of Pennsylvania,* 386 F. Supp. 992 (E.D. Pa. 1974), the defendants relied on *Dombrowski* v. *Dowling,* 459 F.2d 190 (7th Cir. 1972), and asserted that they were all merely the employees of one business entity, the University. The court distinguished *Dombrowski,* saying:

> Defendants attempt to apply this reasoning to the instant case by asserting that they were merely the employees of one business entity, the University, and they made a single decision to deny the plaintiff tenure in the English Department.
>
> We do not agree that the foregoing is a proper characterization of the plaintiff's complaint. She has alleged many continuing instances of discrimination and harassing treatment by the alleged conspirators. Her allegations comprise much more than "essentially a single act of discrimination by a single business entity" and therefore the Dombrowski decision is inapplicable. At 1005-6.

In *Stern* v. *Massachusetts Indemnity & Life Insurance Co.,* 365 F. Supp. 433 (E.D. Pa. 1973), the court applied section 1985 (3) to an insurance company who refused to

sell disability insurance to women on the same terms and conditions as to men. The court held:

> The Supreme Court of the United States has until recently used traditional equal protection analysis in testing legislative classifications based on sex. See, e.g., *Stanley* v. *Illinois*, 405 U.S. 645 * * * (1972); *Reed* v. *Reed*, 404 U.S. 71 * * * (1971). The *Reed* decision, however, was interpreted by Mr. Justice Brennan in Frontiero v. Richardson, 411 U.S. 677 * * * (1973), as providing implicit support for the contention that sex should be treated as inherently suspect. 411 U.S. at 682, 93 S. Ct. 1764. *Frontiero* is the first Supreme Court case to mandate a stricter standard of review in testing sex-based classification.
>
> "Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility * * *' (Case citation omitted). And what differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. (Footnote omitted). As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." 411 U.S. at 686-687. * * *
>
> Accordingly, we find that plaintiff has stated a cause of action under 42 U.S.C. §1983. We also find that plaintiff has stated a cause of action under 42 U.S.C. §1985 (3). * * * At 441-42.

In *Barrett* v. *United Hospital*, 376 F. Supp. 791 (S.D. N.Y. 1974), a physician brought an action against a private hospital which had revoked his staff privileges after his indictment and subsequent plea of assault in satisfaction of a criminal abortion charge. The court followed *Griffin*, saying,

> * * * Nevertheless, in Collins v. Hardyman, 341 U.S. 651 * * * (1951), the Supreme Court held that state action was indeed a necessary ingredient to a cause of action under these statutes. Twenty years later in Griffin v. Breckenridge, 403 U.S. 88 * * * (1971), the Court reconsidered the question and arrived at the opposite conclusion. Section 1985 (3), concluded Justice Stewart, was clearly intended to cover private conspiracies. At 806.

Accord, Mizell v. *Northbroward Hospital District*, 427 F.2d 468, 473 (5th Cir. 1970); *cf. Weise* v. *Syracuse University*, 44 U.S.L.W. 2043 (2d Cir. July 14, 1975); *Thomas* v. *Economic Action Com.*, 505 F.2d 563 (5th Cir. 1974); and *Phillips* v. *Trello*, 502 F.2d 1000 (3rd Cir. 1974). *Contra, Bellamy* v. *Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974).

Judge Ward too lightly dismissed the conspiracy charges in the instant case with the comment that the conspirators were "merely carrying out the corporation's managerial policy." (100A). It is respectfully submitted that he overlooked the charges of harassment and annoyance in Paragraph 16 (f) of the complaint, for instance. The conspiring defendants deliberately and maliciously embarked upon a campaign of harassing telephone calls at all hours of the night and day to the plaintiff, Barbara Gutmacher Girard, in order to make life so miserable for

her that she would quit her $300,000 marital home. By no stretch of the imagination can this campaign of harassment be brushed aside as the corporate defendant's "managerial policy".

Judge Ward also erred in placing his reliance on *Dombrowski* v. *Dowling*, 459 F. 2d 190 (7th Cir. 1972), for in the Seventh Circuit's own view that case involved "a single act of discrimination by a single business entity." At 196.

In any event, a better treatment of *Dombrowski* is that given by the court in *Rackin* v. *University of Pennsylvania*, 386 F. Supp. 992 (E.D. Pa. 1974). There, too, the individual defendants claimed that they were merely the employees of one business entity, the University. The court, in response, called attention to the fact that there were allegations of continuing instances of harassing treatment and dismissed *Dombrowski* with the comment that it was "inapplicable". At 1006.

POINT II

In the past half decade the United States Supreme Court had done almost an about face in its approach to equal rights for women.

Since this case involves discrimination against a woman, Barbara Gutmacher Girard, solely because of her sex, it is relevant to note that in the past few years the United States Supreme Court has done almost an about face in its approach to equal rights for women. The Court's earlier attitude was expressed in *Bradwell* v. *Illinois*, 83 U.S. (16

Wall.) 130 (1873), where the Court in 1873—five years after the Fourteenth Amendment became part of the Constitution and commanded that no state shall deny the equal protection of the laws to any person within its jurisdiction—upheld a decision of the Supreme Court of Illinois that denied a woman the right to practice law. In fairness it must be said that counsel stressed the privileges and immunities provisions. Neither the bench nor the bar thought in terms of the equal protection clause.

The turning point in the Court's course came with *Reed* v. *Reed*, 404 U.S. 71 (1971), where each of the adoptive parents of a deceased minor applied for letters of administration of the decedent's estate. The Idaho Supreme Court held that under such circumstances an Idaho statutory provision gave preference to the male. The federal Supreme Court invalidated the provision as violative of the equal protection clause of the Fourteenth Amendment. Chief Justice Burger wrote for a unanimous Court:

> * * * To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex. *Id.* at 76-77.

The Court took a further small step forward in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), where it ruled that female members of the Armed Services were entitled to the same dependency benefits for their husbands as servicemen were entitled to receive for their wives. There was no

opinion in which five members of the Court joined. Justice Brennan announced the judgment of the Court in an opinion in which Justices Douglas, White and Marshall joined. These four Justices took the position that classifications based upon sex—like those based on race, alienage and national origin—"are inherently suspect" and found "at least implicit support for such an approach in our unanimous decision only last Term in *Reed* v. *Reed*." *Id.* at 682.

Justice Brennan, after quoting from Justice Bradley's concurring opinion in *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1873), continued with this paragraph:

> As a result of notions such as these, our statute books gradually became laden with gross, stereotypical distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. See generally, L. Kantowitz, Women and the Law: The Unfinished Revolution 5-6 (1969); G. Mydral, An American Dilemma 1073 (2d ed. 1962). And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself "preservative of other basic civil and political rights"—until adoption on the Nineteenth Amendment half a century later. 411 U.S. at 685.

One of the Court's cases, *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), *aff'g* 465 F. 2d 1184 (6th Cir. 1972), *rev'g* 326 F. Supp. 1208 (N.D. Ohio 1971), and *rev'g Cohen* v. *Chesterfield County School Bd.*, 474 F. 2d 395

(4th Cir.) (en banc), *rev'g*, 467 F. 2d 262 (4th Cir. 1972), *aff'g*, 326 F. Supp. 1159 (E.D. Va. 1971), involved three pregnant teachers, two in Cleveland, Ohio, and one in Chesterfield County, Virginia, who took school authorities to court over regulations barring them from teaching beyond certain months of pregnancy . The Court ruled in favor of the teachers, saying through Justice Stewart:

> This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. * * *
>
> By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms. 414 U.S. at 639-40.

In two more cases, *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973), the Court decided that a woman had a right to an abortion in the first trimester of pregnancy, saying through Justice Blackmun in the former case:

> To summarize and to repeat:
>
> 1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a *lifesaving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.
>
> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. *Id.* at 164.

At its 1974-1975 term, the Court had nearly a dozen and a half cases in the equal rights between the sexes area on

its docket: *Edwards* v. *Healy*, 43 U.S.L.W. 4722 (U.S. June 9, 1975), *vacating judgment and remanding to* 363 F. Supp. 1110 (E.D. La. 1973), "to consider whether * * * the cause has become moot," where a federal three-judge District Court in Louisiana invalidated a Louisiana constitutional provision that bans women from jury service unless they volunteer for it; *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), *rev'g* 282 So. 2d 491 (La. 1973), and *Daniel* v. *Louisiana*, 420 U.S. 31 (1975), *aff'g* 297 So. 2d 417 (La. 1974), where the Louisiana Supreme Court reached a contrary result; *Leichman* v. *Louisiana*, 420 U.S. 907, *denying cert. to* 286 So. 2d 649 (La. 1973), and *Normand* v. *Louisiana*, 420 U.S. 908 (1975), *denying cert. to* 298 So. 2d 823 (La. 1974), involving the systematic exclusion of women from grand and petit juries; *Lawson* v. *Edwards*, 420 U.S. 907 (1975), *denying cert. to* 214 Va. 632, 202 S.E. 2d 869 (1974), and *Quick* v. *Harris*, 420 U.S. 907 (1975), *denying cert. to* 214 Va. 632, 202 S.E. 2d 869 (1974), where the Virginia Supreme Court held that male defendants had no standing to raise the issue of the systematic exclusion of women from trial juries; *Marshall* v. *Gavin*, 420 U.S. 907 (1975), *denying cert. to sub nom. to Marshall* v. *Holmes*, 495 F. 2d 1371 (5th Cir. 1974), *aff'g without opinion*, 365 F. Supp. 613 (N.D. Fla. 1973), involving a Florida statute that allows women with children under 18 years of age to exempt themselves from jury duty; *Junior Chamber of Commerce of Rochester* v. *United States Jaycees*, 419 U.S. 1026 (1974), *denying cert. to* 495 F. 2d 883 (19th Cir.), and *Junior Chamber of Commerce of Philadelphia* v. *United States Jaycees*, 419 U.S. 1026 (1974), *denying cert. to* 495 F. 2d 883 (10th Cir.), involving the males-only membership policy of the Jaycees; *Sumpter* v. *Indiana*, 419 U.S. 811 (1974), *dismissing appeal*

from 306 N.E. 2d 95 (Ind.), where the Indiana Supreme Court sustained a statute of that state which made it an offense for a woman but not a man, to live in or frequent a house of ill fame; *Murphy* v. *Murphy*, 232 Ga. 352, 206 S.E. 2d 458 (1974), *cert. denied*, 43 U.S.L.W. 3571 (U.S. April 21, 1975), involving the validity of a Georgia alimony statute; *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), *rev'g sub nom. Ballard* v. *Laird*, 360 F. Supp. 643 (S.D. Cal. 1973), where a federal three-judge statutory court in California held that the statutory scheme for the discharge of Navy officers denied male officers equal protection of the laws; *Weinberger* v. *Wiesenfeld*, 43 U.S.L.W. 4395 (U.S. March 19, 1975), *aff'g* 367 F. Supp. 1 (D. N.J. 1973), where a federal three-judge statutory court in New Jersey ruled on equal protection grounds that a widower with children was entitled to the same Social Security Act survivor's benefits as a widow; *Stanton* v. *Stanton*, 43 U.S.L.W. 4449 (U.S. April 15, 1975), *rev'g and remanding to* 30 Utah 2d 315, 517 P. 2d 1010 (1974), involving a Utah statute under which for support purposes men became of age at 21, but women at 18; *Anderson* v. *Radcliff*, 95 S. Ct. 1667 (1975), *denying cert. to* 509 F. 2d 1093 (10th Cir. 1974-1975), involving an Oklahoma statute allowing juvenile court benefits to females under the age of 18 while limiting such benefits to males under 16; and *Turner* v. *Dep't of Employment Security*, 43 U.S.L.W. 3585 (U.S. April 18, 1975) (No. 74-1312), *petition for cert. filed to review* (Utah Sup. Ct. Feb. 4, 1975), where the Utah Supreme Court sustained the validity of that state's statute denying unemployment compensation benefits to pregnant women during 12 weeks prior to and 6 weeks after childbirth.

In one of these cases, *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), the Court, by a vote of eight to one, ruled that the changing economic and social patterns of the past dozen years made it constitutionally unacceptable for states to deny women an equal opportunity with men to serve on juries. Justice White wrote for the majority: "If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed." 419 U.S. at 537. Only Justice Rehnquist dissented.

In its latest ruling, *Stanton* v. *Stanton*, 43 U.S.L.W. 4449 (U.S. April 15, 1975), a child support case, the Court voided a Utah law setting different ages of majority for men and women. Speaking through Justice Blackmun the Court said:

> No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. *See Taylor* v. *Louisiana.* * * * Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary antecedent, is apparent and a proper subject of judicial notice. *Id.* at 4451.

Again Justice Rehnquist was the lone dissenter.

In *Stanton* the Court, citing a half dozen of its recent decisions, including *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), found "it unnecessary in this case to decide whether a classification based on sex is inherently suspect." 43 U.S.L.W. at 4451.

However, some of the lower federal courts have followed Justice Brennan's opinion in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), in which Justices Douglas, White and Marshall joined, and held that classifications based on sex like those based on race, alienage and national origin are "inherently suspect." For instance, a federal three-judge court in New Jersey in *Wiesenfeld* v. *Secretary of Health, Education and Welfare*, 367 F. Supp. 981 (D. N.Y. 1973), *aff'd sub nom. Weinberger* v. *Wiesenfeld*, 43 U.S.L.W. 4393 (U.S. March 19, 1975), in ruling that a widower was entitled to the same Social Security death benefits that a widow collects in mother's insurance benefits, was persuaded by Justice Brennan's opinion in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), that classifications based on sex are inherently suspect. 367 F. Supp. at 990. As another example, see *Stern* v. *Massachusetts Indemnity and Life Insurance Co.*, 365 F. Supp. 433, 441-42 (E.D. Pa. 1973).

POINT III

The conspiring defendants, by their arbitrary conduct in attempting to throw Barbara Gutmacher Girard out of her marital home without any opportunity for a hearing or a statement of any reasons, violated our concept of due process, of fundamental fairness.

The conspiring defendants, Lawrence Wilkinson, John H. Stookey, and Thomas E. Murray, treated Barbara Gutmacher Girard with contempt. They gave her no hearing. They gave her no reason why they did not want her. Instead, they sought arbitrarily to throw her and her 9-year-old daughter, Nicole, out of the $300,000 fourth floor apart-

ment at 1125 Fifth Avenue, in which Barbara Gutmacher Girard had been one of the original occupants and which was her marital home. Such arbitrary and unreasoned conduct violates our concept of due process, of fundamental fairness.

The concept of due process has been continuously evolving for some eight centuries. One can date this development from 1178, when Henry II appointed five judges for the whole kingdom and told them "to do right judgment." 2 *English Historical Documents* 482 (D. Douglas & G. Greenway gen. ed. 1953). Sufficient legal development followed so that a generation later, when Henry II's son John misused his powers, the result was the Magna Charta and John was forced to promise his barons:

> No freeman shall be taken or imprisoned or disseised or exiled, or in any way destroyed, nor will go upon him, nor send upon him, except by the lawful judgment of his peers or (per legem terrae) by the law of the land. *W. McKechnie, Magna Charta* 375 (2d ed. 1914).

In the course of time the concept "law of the land" also came to mean due process of law. King John's successors confirmed and reissued the Magna Charta, sometimes repeatedly. In 1354, Edward III (1327-1377), in addition to his frequent confirmations of the Magna Charta, further provided:

> (N)o Man of what Estate of Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in answer (par due process de lei) by due Process of Law. 28 Edw. 3, c. 3 (1354).

Thus the phrase "due process of law" came into being.

Coke equated the two: "(B)y the law of the land (that is to speak it once for all) by the due course, and process of law." 2 *Institutes* *46. In this country, we have made the same identification. Our earlier state constitutions usually used the phrase, "by the law of the land." In *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819), Daniel Webster identified the law of the land provision of the New Hampshire Constitution with due process:

> One prohibition is, "that no person shall be * * * deprived of his life, liberty, or estate, but by judgment of his peers, or the law of the land." * * *
>
> * * * Have the plaintiffs lost their franchises by "due course and process of law?" By the law of the land is most clearly intended the general law. * * * The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. *Id.* at 561, 581 (argument for plaintiffs in error).

Similarly, the Supreme Court equated the due process clause with the law of the land in *Murray's Lesee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855), its first major decision under the due process clause of the Fifth Amendment:

> The words, "due process of law," were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in *Magna Charta*. Lord Coke in his commentary on those words, (2 Inst. 50), says they mean due process of law. The constitutions which have been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land." *Id.* at 276.

In *Twining* v. *New Jersey,* 211 U.S. 78 (1908), the Court, through Justice Moody, explained:

> There are certain general principles well settled, however, which narrow the field of discussion and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American courts on the authority of Coke, that the words "due process of law" are equivalent in meaning to the words "law of the land," contained in * * * Magna Charta. * * *

In a yet later case, *Hebert* v. *Louisiana,* 272 U.S. 312 (1926), the Court said:

> What it (due process clause) does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as "law of the land." *Id.* at 316-17.

In the recent past, Justices Frankfurter and Harlan have given us apt statements of the due process concept. In *Bartkus* v. *Illinois,* 359 U.S. 121 (1959), Justice Frankfurter explained:

> Decisions under the Due Process Clause require close and perceptive inquiry into fundamental principles of our society. The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment. *Id.* at 128.

In his concurring opinion in *Griffin* v. *Illinois,* 351 U.S. 12 (1956), he stated:

> "Due Process" is, perhaps, the least frozen concept of our law—the least confined to history and the most absortive of powerful social standards of a progressive society. *Id.* at 20-21 (concurring opinion).

In *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), in a concurring opinion in which Justice Harlan joined, Justice Frankfurter added:

> The implications of the United States Constitution for national elections and "the concept of ordered liberty" implicit in the Due Process Clause of the Fourteenth Amendment as against the States * * * were not frozen as of 1789 or 1868, respectively. While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning.

Justice Harlan thought due process to be fundamental fairness. See, *e.g.*, *Duncan* v. *Louisiana*, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting). It is this concept which the courts have been applying to various membership organizations such as political parties, economic groups, labor unions, stock exchanges, religious organizations, Veteran's associations, and professional societies. For example, in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), the Court held that the New York Stock Exchange could not deny to two Texas over-the-counter broker-dealers direct wire connections without the notice and hearing that they requested. The Court explained in Footnote 17:

> The basic nature of the rights which we hold to be required under the antitrust laws in the circumstances of today's decision is indicated by the fact that public agencies, labor unions, clubs, and other associations

> have, under various legal principles, all been required to afford notice, a hearing, and an opportunity to answer charges to one who is about to be denied a valuable right. 373 U.S. at 364 n. 17.

In an interesting state case, *Van Daele* v. *Vinci*, 51 Ill. 2d 389, 282 N.E.2d 728, *cert. denied*, 409 U.S. 1007 (1972), the Supreme Court of Illinois gave due process relief to retail grocers who had been expelled from membership in a grocery cooperative because of lack of impartiality of the cooperative's board, even though the board followed the procedure set out in the cooperative's by-laws for disciplinary hearings.

Perhaps the most discussed situation to date involved the power of the Democratic Party to exclude from its 1972 national convention certain challenged delegates from California and Illinois. The California delegates were selected in a "winner-take-all" primary. The District of Columbia Circuit in *Brown* v. *O'Brien*, 469 F.2d 563 (D.C. Cir.), *stay granted*, 409 U.S. 1 (1972), *vacated*, 409 U.S. 816 (1972), and *sub nom. Keane* v. *National Democratic Party*, 409 U.S. 816 (1972), ruled in their favor, reasoning:

> The decision of the Party to exclude these 151 delegates, who were elected in compliance with each of the party's applicable rules then in force, jeopardizes the integrity of the election process, and it therefore injures every voter in the United States and every individual and institution which is subject to the authority of the President. Because we are convinced that the process of electing the President of the United States is not, and cannot be placed outside the rule of law, we set aside the arbitrary and unconstitutional action of the Democratic Party. 469 F. 2d at 570.

The Supreme Court first granted a stay and subsequently vacated the judgment and remanded the case for a determination whether it had become moot.

American labor unions have also found themselves subject to the expanding reach of due process, of fundamental fairness. In two cases, *NLRB* v. *Textile Workers*, 409 U.S. 213 (1972), and *Booster Lodge No. 405* v. *NLRB*, 412 U.S. 84 (1973), the Court held that unions could not fine strikebreakers who had lawfully resigned from their unions during the strike period but later returned to work.

Members of stock exchanges, involved in disciplinary proceedings, also have taken their respective exchanges to court with due process claims. In *Crimmins* v. *American Stock Exchange, Inc.*, 346 F. Supp. 1256 (S.D. N.Y. 1972), the court, although ruling against the right to counsel in that case, nevertheless said: "We think that the day is long gone when a national stock exchange can be considered a private club when it conducts disciplinary proceedings against its members or their employees."

In *Villani* v. *New York Stock Exchange, Inc.*, 348 F. Supp. 1185 (S.D. N.Y. 1972), counsel for the Exchange advised the court by letter that the Board of Governors of the Exchange approved various recommendations to change the hearing procedures and disciplinary proceedings conducted by the Exchange. In a subsequent letter, counsel reported that both the SEC and the membership of the Exchange had approved the recommendations, one of which abolished the Exchange's "no-counsel rule":

> A person, firm or corporation shall have the right to be represented by legal or other counsel in any hearing

> and review thereof held pursuant to the provisions of this Article and in any investigation before any committee, officer or employee of the Exchange authorized by the Board of Directors. *Id.* at 1189, *quoting* §23, Article XIV of the Constitution of the New York Stock Exchange.

For a fuller discussion see O. J. Rogge, *An Overview of Administrative Due Process* (pts. 1 and 2), 19 Villanova Law Review 1, 2-4, 197, 251-55 (1973).

There are two due process clauses in the federal Constitution, one in the Fifth Amendment and one in the Fourteenth Amendment. The Fifth Amendment is primarily for federal action and the Fourteenth Amendment primarily for state action. However, our concept of due process, of fundamental fairness, is more pervasive. Barbara Gutmacher Girard, who, with her husband, had the $300,000 fourth floor apartment at 1125 Fifth Avenue, should not arbitrarily be thrown out without any notice, any hearing, or any statement of reasons. She is entitled to fundamental fairness, to due process, at their hands. This was her right, her due, as one of the privileges and immunities of a citizen of the United States. It was part of her due under the due process clauses of the Fifth and Fourteenth Amendments.

POINT IV

Judicial action is state action under section 1 of the Civil Rights Act of 1871, 42 U.S.C. §1983 (1970).

Historically, judicial action was considered state action at the time of the adoption of the Civil Rights Acts. Judicially, the United States Supreme Court settled the matter in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), involving restrictive covenants. There the Court held:

> The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory divisions, it has never been suggested that the state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government. At 18.

Let us suppose that a group of whites had a section of land under restrictive covenants against blacks and then obtained a ruling from the local state court that these restrictive covenants were valid despite *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). Can there be any doubt that the blacks could go into the local federal district court and obtain a ruling that *Shelley* v. *Kraemer, supra,* was the law of the land? The same results should follow where there has been discrimination against a woman, for discrimination against women is just as destructive to us as discrimination against blacks.

POINT V

Civil Rights Acts provide federal remedies supplementary to state remedies and there need be no exhaustion of either federal or state remedies in state courts before resort to federal courts.

The remedies provided by sections 1 and 2 of the Civil Rights Act of 1871, 42 U.S.C. §§1983 and 1985 (3) (1970), are peculiarly for enforcement in the federal courts. And it is in the federal courts that these remedies have had their greatest development, particularly in the United States Supreme Court.

Historically, these remedies were intended for the federal courts. The United States Supreme Court authoritatively affirmed this fact in *Monroe* v. *Pape*, 365 U.S. 167 (1961), and reaffirmed it two years later in *McNeese* v. *Board of Education*, 373 U.S. 668 (1963).

Monroe v. *Pape*, 365 U.S. 167 (1961), involved a civil rights act suit in the federal court based on an illegal search and seizure in Illinois. The Court sustained the suit despite the fact that Illinois, by its constitution and laws, outlawed unreasonable searches and seizures. The Court, after an exhaustive study of the congressional debates, concluded:

> The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth

> Amendment might be denied by the state agencies. At 180.

After a further study of sections 1 and 2 of the Civil Rights Act of 1871, the Court ruled:

> Although the legislation was enacted because of the conditions that existed in the South at the time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates. It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court. At 183.

Two years later the Court reaffirmed its holding in *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), a Civil Rights Act suit based on the fact that in what was apparently an integrated school in Illinois, the blacks were put in one part of the school and the whites in another. The district court dismissed the complaint because the petitioners had not exhausted their administrative remedies under Illinois law. The Seventh Circuit affirmed, but the Supreme Court reversed, saying:

> We have previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy. At 671.

Accord, Wilwording v. *Swenson*, 404 U.S. 249 (1971).

Under sections 1 and 2 of the Civil Rights Act of 1871, 42 U.S.C. §§1983, 1985 (3) (1970), the federal courts have given not only compensatory damages but injunctive relief as well. Moreover, the courts have held that these provisions are an exception to the anti-injunction statute, 28 U.S.C. 2283 (1970). The United States Supreme Court approached this question in *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), *rev'g* 318 F. Supp. 1111 (D. Conn. 1970), and settled it in *Mitchum* v. *Foster*, 407 U.S. 225 (1972).

In *Lynch* v. *Household Finance Corp.*, a three-judge federal district court in Connecticut refused to consider the constitutionality of Connecticut prejudgment and garnishment statutes "for lack of Civil Rights Act jurisdiction," 318 F. Supp. at 1114. But the Supreme Court reversed and remanded the case. Justice Stewart pointed out:

> Because of the extrajudicial nature of Connecticut garnishment, an injunction against its maintenance is not, therefore, barred by the terms of §2283. In light of this conclusion, we need not decide whether §1983 is an exception to §2283 "expressly authorized by Act of Congress." We have explicitly left that question open in other decisions. And we may put it to one side in this case because the state act that the federal court was asked to enjoin was not a proceeding "in a State court" within the meaning of §2283. 405 U.S. at 556.

Later in the term, in *Mitchum* v. *Foster*, 407 U.S. 225 (1972), the Court did hold that the Civil Rights Act remedies were within the exception of 28 U.S. §2283 (1970). *Mitchum* v. *Foster* involved a state obscenity proceeding. The Court, in an opinion by Justice Stewart, reasoned:

Section 1983 was originally §1 of the Civil Rights Act of 1871. 17 Stat. 13. It was "modeled" on §2 of the Civil Rights Act of 1866, 14 Stat. 27, and was enacted for the express purpose of "enfore(ing) the Provisions of the Fourteenth Amendment." 17 Stat. 13. The predecessor of §1983 was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. As a result of the new structure of law that emerged in the post-Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece—the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. *Monroe* v. *Pape*, 365 U.S. 167; *McNeese* v. *Board of Education*, 373 U.S. 668; *Shelley* v. *Kraemer*, 34 U.S. 1; *Zwickler* v. *Koota*, 389 U.S. 241, 245-249; H. Flack, The Adoption of the Fourteenth Amendment (1908); J. tenBr[illegible], The Anti-Slavery Origins of the Fourteenth A[illegible]ndment (1951). Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.

* * *

It is clear from the legislative debates surrounding passage of §1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment "against State action, * * * whether that action be executive, legislative, or *judicial*." *Ex parte Virginia*, 100 U.S. 339, 346 (emphasis supplied). Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights. At 238-40.

Justice Stewart then gave a review of legislative history and concluded for the Court:

> This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts. At 242.

Recently in *Carr* v. *Thompson*, 384 F. Supp. 544 (W.D. N.Y. 1974), involving the refusal by the defendants to allow the plaintiff to take a certain Civil Service examination, Chief Judge Curtin, in giving injunctive relief, concluded:

> The defendants have not made a motion to dismiss based on improper jurisdiction, but they argue in their brief that plaintiff could have proceeded by way of an Article 78 proceeding pursuant to the New York Civil Practice Law and Rules, and that jurisdiction of this action by this court is improper. In construing the Civil Rights Act, the Supreme Court has held that a federal remedy under the Civil Rights Act is supplementary to any remedy that may exist under state law, and that it is not necessary to seek the state remedy before invoking the federal one. *See* Monroe v. Pape, 365 U.S. 167, 183 * * * (1961); Wilwording v. Swenson, 404 U.S. 249 * * * (1971). Therefore, the court finds that jurisdiction is proper. At 547.

The plaintiff-appellant, Barbara Gutmacher Girard, did not have to bring her Civil Rights Act claims that the defendants, Lawrence Wilkinson, John H. Stookey, and

Thomas E. Murray, discriminated against her solely because she was a woman in the state courts. Instead, she brought her claims to the appropriate federal forum.

POINT VI

Because the Civil Rights Act of 1871 provides federal remedies supplementary to state remedies, Barbara Gutmacher Girard's complaint is not barred by doctrines of *res judicata* or collateral estoppel.

Barbara Gutmacher Girard did not bring her claims of sexual discrimination in the state courts. She did not have to do so.

Nor did her failure to bring her federal claims in the state courts constitute a waiver. As a matter of law, a waiver of constitutional rights is not to be presumed. As a matter of fact, Barbara Gutmacher Girard did not waive any of her rights.

A case in point is *Lombard* v. *Board of Education*, 507 F. 2d 631 (2d Cir. 1974). Lombard contended that he was denied his First Amendment rights and his Fourteenth Amendment rights to due process when his employment as a probationary teacher was terminated by the New York City Board of Education without his first having received written reasons supporting that termination and an evidentiary hearing. The Board of Education took the position that *res judicata* barred all of Lombard's constitutional claims on the ground that he had a full opportunity to raise all the issues involved in state court proceedings he brought to challenge the termination of his probationary employment.

The Federal District Court for the Eastern District of New York dismissed Lombard's complaint, but the Second Circuit reversed, saying, in an opinion by District, now Circuit, Judge Gurfein:

> First, when the Civil Rights Act was authoritatively interpreted in Monroe v. Pape, 365 U.S. 167, 183 * * * (1961), the Supreme Court said:
>
> The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.
>
> To apply res judicata to a remedy which "need not be first sought and refused" in the state court, and which actually was not sought would be to overrule the essence of Monroe v. Pape and Lane v. Wilson, 307 U.S. 268, 274 * * * (1939).
>
> Second, if a federal action under section 1983 is considered to be the *same* cause of action as the state action for purposes of claim preclusion, then a plaintiff desiring to raise a state statutory construction issue or even a state constitutional issue would, and probably should, not be able to raise these points in the federal district court in the first instance. See Reid v. Board of Educ., 453 F. 2d 238 (2d Cir. 1971); Coleman v. Ginsberg, 428 F. 2d 767 (2d Cir. 1970). Here, even if we would like to put all the issues in the same court, we are better off not to *compel* the plaintiff to seek constitutional redress in the state court or statutory construction in the federal court. See McNeese v. Board of Educ., 373 U.S. 668 * * * (1963). That is what we think choice of forum means in Civil Rights Act cases.
>
> * * *
>
> We think that the problem, strictly speaking, is not a res judicata problem. We think it is rather a question of whether the appellant has "waived" his con-

stitutional rights. It is not quite fair to say that he "waived" his right to assert in the administrative agency itself that the process afforded was not "due process." For such an attack in the administrative agency itself on the ground of unconstitutionality would be futile. *Cf.* McNeese v. Board of Educ., supra, 373 U.S. at 675 * * *. See also Judge Friendly's explanation of Damico v. California, 389 U.S. 416 * * * (1967), in Eisen v. Eastman, 421 F. 2d 560, 569 (2d Cir. 1969), cert. denied, 400 U.S. 841 * * * (1970); Friendly, Federal Jurisdiction: A General View 100 & n. 111. Nor is the plaintiff required to make the attack in an Article 78 proceeding in the state court, for section 1983 gives him an independent supplementary cause of action, and he may choose the federal court as the preferred forum for the assertion of constitutional claims of violation of due process. McNeese v. Board of Educ., supra. Indeed, if waiver is treated as a modality of exhaustion of remedy, the exhaustion, similarly, need not be of the state judicial remedy, but only of the administrative remedy. See James v. Board of Educ., 461 F. 2d 566 (2d Cir. 1972).

* * *

If we treat the problem as a more limited one of collateral estoppel (issue preclusion), policy still prevents its application for the reasons given. At 635-36, 637.

Although this case involved section 1983, the same result should apply to section 1985 (3). Also this case cannot be confined to "procedural" due process and the court so held in *Liquifin Aktiengesellschaft* v. *Brennan,* 383 F. Supp. 978 (S.D. N.Y. 1974), saying:

Bolstering the conclusion that plaintiff is not collaterally estopped from bringing his constitutional claims before this Court is the recent decision in Lom-

> bard v. Board of Edu..ation. There, the Second Circuit held that due to the uniquely supplementary nature of the remedy represented by 42 U.S.C. §1983, traditional principles of *res judicata* and collateral estoppel are to be relaxed in civil rights actions. Although it is possible to limit this decision to cases involving procedural due process, such a narrow reading is not called for. Judge Gurfein's opinion is best read as holding that constitutional arguments which can be raised in 1983 actions will not lightly be found to have been waived due to a failure to raise them in a prior state proceeding. At 983.

Barbara Gutmacher Girard did not raise any of her claims under sections 1 and 2 of the Civil Rights Act of 1871, 42 U.S.C. §§1983 and 1985 (3) (1970), in the state courts. She did not have to do so. Nor did she waive any of these claims. Rather she wants them decided in the federal forum.

Conclusion

The order of the court below granting the motion of the defendants for summary judgment should be reversed. In addition, the Court should direct the court below to permit the plaintiff, Barbara Gutmacher Girard, to amend her complaint, if she moves to do so, within twenty (20) days of this Court's decision.

Although the complaint in the instant case alleges with an abundance of sufficiency violations of sections 1 and 2 of the Civil Rights Act of 1971, 42 U.S.C. §§1983 and 1985 (3) (1970), what it alleges is but the tip of the iceberg of

the facts of the conspiring defendants in furtherance of their conspiracy to make life so unendurable for her solely because she is a lone woman that she would quit her $300,000 marital home.

Federal courts in Civil Rights complaints, rather than reach out to dismiss such complaints as the court below did, have combed such complaints to find sufficient allegations to make out causes of action. Illustrative cases are *Richardson* v. *Miller*, 446 F. 2d 1247 (3rd Cir. 1971); *Pendrell* v. *Chatham College*, 386 F. Supp. 341 (W.D. Pa. 1974); *Rackin* v. *University of Pennsylvania*, 336 F. Supp. 992 (E.D. Pa. 1974). For example, in *Richardson* v. *Miller*, *supra*, the Third Circuit held and said:

> The question facing this court is whether the allegations of plaintiff's complaint (particularly paragraphs EIGHT and NINE) are sufficient to constitute the "racial, or perhaps otherwise class-based invidiously discriminatory animus" required by *Griffin*. While the question is very close, particularly because unlike *Griffin* the plaintiff is not a member of the class allegedly discriminated against, we have concluded that, in light of the trend in recent decisions to "accord (to the civil rights status) a sweep as broad as (their) language." *Griffin*, *supra*, p. 97, * * * and in light of the standard by which these allegations must be viewed when faced with a motion under Rule 12 of the Federal Rules of Civil Procedure, the question must here be answered in the affirmative. 446 F. 2d at 1249.

Under the approach of the federal courts in Civil Rights cases, the plaintiff, Barbara Gutmacher Girard, is entitled to prevail against the conspiring defendants. The Court should reverse the summary judgment order of the court

below and in addition direct that court to permit the plaintiff to amend her complaint, if she moves to do so, within twenty (20) days of this Court's decision.

Respectfully submitted,

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Service of 2 copies of the
within Brief is hereby
admitted this 12th day of
Sept. 1975

Signed [illegible]

Attorney for Defendants-Appellees